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**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**SAN JOSE DIVISION**

FINISAR CORPORATION, a Delaware  
corporation,

Plaintiff,

v.

U.S. BANK TRUST NATIONAL  
ASSOCIATION, a national banking  
association, not in its individual capacity,  
but solely in its capacity as Indenture  
Trustee in behalf of all Holders of Finisar  
Corporation's 5¼% Convertible  
Subordinated Notes due 2008, 2½%  
Convertible Senior Subordinated Notes due  
2010, and 2½% Convertible Subordinated  
Notes due 2010; and DOES 1 through 10,  
inclusive,

Defendants

AND RELATED COUNTERCLAIMS.

Case No. 5:07-CV-04052-JF (PVT)

**PLAINTIFF FINISAR CORPORATION'S  
MOTION TO:**

- (1) COMPEL PRODUCTION OF  
DOCUMENTS;**
- (2) COMPEL DEPOSITION  
TESTIMONY; AND**
- (3) FOR ADDITIONAL TIME TO  
COMPLETE DEPOSITION**

(Declaration of L. Rex Sears and Motion for  
Sanctions filed herewith)

Date: **Tuesday, June 17, 2008**  
Time: **10:00 a.m.**  
Courtroom: **5 (Magistrate Judge Trumbull)**

District Judge: Hon. Jeremy Fogel  
Magistrate Judge: Hon. Patricia V. Trumbull

Complaint Filed: June 22, 2007  
Trial Date Set: None Yet



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## NOTICE OF MOTION

TO DEFENDANT U.S. BANK TRUST NATIONAL ASSOCIATION AND TO ITS  
ATTORNEYS OF RECORD IN THE ABOVE-CAPTIONED ACTION:

PLEASE TAKE NOTICE that, on **Tuesday, June 17, 2008, at 10:00 a.m.**, or as soon thereafter as the matter may be heard, in Courtroom 5 of the above-entitled Court (the Honorable Patricia V. Trumbull, United States Magistrate Judge, presiding) located at 280 South First Street, San Jose, California, plaintiff Finisar Corporation (“Finisar”) shall—and hereby does—move the Court to enter an order:

- (1) Compelling defendant U.S. Bank Trust National Association (“U.S. Bank”) to produce documents withheld from production based on assertion of a joint-defense privilege protecting communications between U.S. Bank and its counsel, on the one hand, and individuals and entities alleged to hold convertible notes (the “Noteholders”) issued under the contractual trust indentures at issue in the above-captioned action (the “Action”), on the other;
- (2) Compelling U.S. Bank to provide additional deposition testimony by Diana L. Jacobs, its Vice President and designee pursuant to Federal Rules of Civil Procedure 30(b)(6),<sup>1</sup> relating to communications with Noteholders; and
- (3) Enlarging the time for Finisar to complete the deposition of Ms. Jacobs beyond the seven hours ordinarily permitted.

In the concurrently-filed “Plaintiff Finisar Corporation’s Motion for Monetary Discovery Sanctions” (the Motion for Sanctions”), Finisar is also seeking monetary sanctions, consisting of compensation for the expense of preparing and prosecuting the instant motion (the “Motion to Compel”) and of completing Ms. Jacobs’ deposition.

Finisar’s instant Motion to Compel is and shall be made pursuant to Rules 26(b)(2)(A), 30(d)(2), and 37(a)(3)(B); and on the grounds that U.S. Bank’s communications with Noteholders are not privileged. The undersigned counsel for Finisar certifies that he and his colleague have

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<sup>1</sup> Subsequent “Rule” references are to the Federal Rules of Civil Procedure, unless otherwise indicated.

1 conferred, in person and in writing, with counsel for U.S. Bank, regarding the issues addressed by  
 2 this Motion to Compel. The conference process has resulted in negotiated resolution of several  
 3 other deficiencies, but the parties have reached impasse with respect to the assertion of privilege  
 4 targeted by this Motion to Compel.

5 Finisar's Motion to Compel is and shall be based upon this Notice, the Points and  
 6 Authorities set forth below, the accompanying "Declaration of L. Rex Sears in Support of Finisar  
 7 Corporation's Motion to Compel and for Sanctions" ("Sears Decl."), the pleadings, documents,  
 8 and other records on file in the above-captioned action (the "Action"), and such additional  
 9 evidence and argument as may be presented in connection with the hearing and determination of  
 10 the Motion to Compel.

## 11 POINTS AND AUTHORITIES

12 Finisar respectfully offers the following points and authorities in support of its Motion to  
 13 Compel.

### 14 I. INTRODUCTION

15 Finisar and U.S. Bank are parties to a series of three trust indentures ("Indentures") under  
 16 which Finisar issued three series of convertible notes ("Notes"). Late in 2006, Finisar informed  
 17 the Securities and Exchange Commission ("SEC") and U.S. Bank that it had commenced an  
 18 internal investigation, which might necessitate deferral of Finisar's filing of certain periodic  
 19 reports with the SEC and thus, perforce, with U.S. Bank. U.S. Bank alleged that Finisar had  
 20 thereby defaulted under the Indentures, leading Finisar to commence this Action seeking a  
 21 declaration that it had not. Since the Action was commenced, three federal courts addressing  
 22 similar allegations between different parties to similarly-worded contracts have issued rulings  
 23 adopting Finisar's position, while none has adopted U.S. Bank's<sup>2</sup>; and Finisar has filed *all* of its  
 24 periodic reports.

25 The discovery Finisar has been denied bears on at least two disputed issues, one of which  
 26 is already the subject of a pending motion for summary judgment by U.S. Bank. First, U.S. Bank

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27 <sup>2</sup> Before this Action was commenced, one state court had issued an unpublished decision to the  
 28 contrary, but each of the federal courts to have subsequently addressed the issue have disagreed  
 with that court's holdings and expressly rejected its reasoning.

1 maintains and has moved for summary judgment that Finisar is obligated to pay attorney's fees  
2 incurred by U.S. Bank, regardless of who prevails on the underlying issues. Second, U.S. Bank  
3 has sued Finisar for unspecified damages allegedly suffered by the Noteholders. In addition to  
4 disputing both claims on purely legal grounds, Finisar also disputes the first because U.S. Bank  
5 has incurred fees negligently or in bad faith, and the second because from the discovery Finisar  
6 *has* obtained it appears that none of the Noteholders has apprised U.S. Bank of any compensable  
7 injury. (*See* Sears Decl., Ex. "B," 180:3-20.) To further substantiate both arguments, Finisar  
8 requires discovery of communications between U.S. Bank and the Noteholders, in whose behalf  
9 U.S. Bank claims to have acted.

10 U.S. Bank has frustrated Finisar's efforts to conduct deposition and document discovery  
11 reasonably calculated to lead to the discovery of admissible evidence relevant at least to U.S.  
12 Bank's claims for fees and damages by asserting that its communications with the Noteholders  
13 are subject to some sort of joint defense privilege. Because the conditions for asserting such a  
14 privilege are not here met, U.S. Bank's invocation of the joint defense privilege has been  
15 improper and unjustified. Still, U.S. Bank has refused to budge on this issue. Thus, Finisar  
16 brings this Motion to Compel.

17 By way of relief, Finisar seeks production of documents and deposition testimony hitherto  
18 withheld based on the errant assertion of privilege. Because much of its time with U.S. Bank's  
19 deponent was spent trying to overcome U.S. Bank's incorrect assertion of privilege and obtain the  
20 withheld testimony, Finisar also seeks enlargement of the seven-hour period ordinarily permitted  
21 to conduct a deposition. In its companion Motion for Sanctions, Finisar seeks an order requiring  
22 U.S. Bank to reimburse it for the expense of preparing and prosecuting this Motion to Compel,  
23 and to pay the attorney's fees and other costs that will be associated with resuming the deposition  
24 to obtain the improperly denied discovery.

## 25 II. BACKGROUND

26 On March 26, 2008, Finisar deposed Diana L. Jacobs, Vice President of U.S. Bank  
27 National Association, both as an individual and in her capacity as U.S. Bank's designee pursuant  
28 to Rule 30(b)(6), in accordance with the deposition notice reproduced as Exhibit "A" to the

1 accompanying Sears Declaration. As reflected in the Rule 30(b)(6) notice, Ms. Jacobs appeared  
 2 *inter alia* as U.S. Bank's designee regarding communications with Noteholders. But during her  
 3 deposition, she was instructed by U.S. Bank's counsel not to answer Finisar's questions relating  
 4 thereto, based on U.S. Bank's invocation of a "joint defense privilege" for communications  
 5 between U.S. Bank and the Noteholders. The questions and answers at issue in the instant  
 6 Motion to Compel are set forth in Schedule "A" hereto.<sup>3</sup>

7 In addition to refusing to provide certain deposition testimony, U.S. Bank has also  
 8 withheld from production certain documents transmitted by or to the Noteholders. By this  
 9 Motion to Compel, Finisar also seeks production of the documents identified in the entries from  
 10 U.S. Bank's March 25, 2008 privilege log that are reproduced in Schedule "B" hereto.

### 11 III. LEGAL PRINCIPLES

#### 12 A. Principles Relating to Privilege in General

13 "The fact that a person is a lawyer does not make all communications with that person  
 14 privileged." *United States v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002). To the contrary,  
 15 "[b]ecause it impedes full and free discovery of the truth, the attorney-client privilege is strictly  
 16 construed." *Weil v. Investment/Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 24 (9th Cir.  
 17 1981). "The burden is on the party asserting the privilege to establish all the elements of the  
 18 privilege." *Martin*, 278 F.3d at 999-1000.

#### 19 B. Origins and Overview of "Joint Defense" Privilege

20 "In its original form," the joint-defense privilege "allowed the attorneys of criminal co-  
 21 defendants to share confidential information about defense strategies without waiving the  
 22 privilege as against third parties." *In re Teleglobe Comms. Corp.*, 493 F.3d 345, 364 (3d Cir.  
 23 2007).

24 Later, courts replaced the joint-defense privilege, which only applied to criminal  
 25 co-defendants, with a broader one that protects all communications shared within a  
 26 proper "community of interest," whether the context be criminal or civil. Thus,  
 the community-of-interest privilege allows attorneys representing different clients

27 <sup>3</sup> The Schedule sets forth in full the questions asked, the objections made, and the response (if  
 28 any) given, together with preceding questions and answers to the extent necessary to provide  
 context (in the column labeled "Setup"). Pertinent excerpts from the transcript are reproduced as  
 Exhibit "B" to the Sears Declaration.

with similar legal interests to share information without having to disclose it to others. It applies in civil and criminal litigation, and even in purely transactional contexts.

*Id.* (citations omitted).

“Federal courts have used the term ‘joint defense privilege’ to refer to both the joint client privilege and the common interest rule privilege.” *Securities Investor Protection Corp. v. Stratton Oakmont, Inc.*, 213 B.R. 433, 435 n. 1 (Bankr. S.D.N.Y. 1997). However, “[a] distinction should be made between these two doctrines”: “The joint client doctrine applies when clients share the same lawyer; whereas the common interest or allied lawyer doctrine applies when parties with separate lawyers consult together under the guise of a common interest or defense.” *Id.*

### C. Limitations on “Joint Defense” Privilege

Even under the broadened community of interest doctrine, “to be eligible for continued protection, the communication must be shared with the *attorney* of the member of the community of interest. Sharing the communication directly with a member of the community may destroy the privilege.” *Teleglobe*, 493 F.3d at 364 (citations omitted). “The attorney-sharing requirement helps prevent abuse by ensuring that the common-interest privilege only supplants the disclosure rule”—i.e., the rule that disclosure outside the attorney-client relationship waives privilege—“when attorneys, not clients, decide to share information in order to coordinate legal strategies.” *Id.* at 365.

“[T]he joint defense privilege is merely an extension of the attorney-client privilege . . . . In other words, it confers no independent privileged status to documents or information.” *Metro Wastewater Reclamation Dist. v. Continental Cas. Co.*, 142 F.R.D. 471, 478 (D. Colo. 1992). The common interest doctrine is simply an exception to the rule that “[d]isclosing a communication to a third party . . . waives the privilege.” *Teleglobe*, 493 F.3d at 361. “Thus, to be eligible for protection under the joint defense privilege, it must be established that the materials fall within the ambit of . . . the attorney-client privilege,” to begin with. *Metro*, 142 F.R.D. at 478.



#### IV. ARGUMENT

##### A. U.S. Bank and the Noteholders Are Not Joint Clients of U.S. Bank's Counsel.

U.S. Bank's deponent and counsel have both confirmed that U.S. Bank's counsel does not represent the Noteholders. (Sears Decl., Ex. "B," 194:12-24; 195:7-12.) Accordingly, the issue presented by U.S. Bank's invocation of privilege is whether its communications with the Noteholders fall within the "common interest doctrine."

##### B. Because the Noteholders Were Unrepresented, No Joint Defense Privilege Applies.

As noted above, "the common interest or allied lawyer doctrine applies when parties *with separate lawyers* consult together under the guise of a common interest or defense." *Securities Investor Protection Corp.*, 213 B.R. at 435 n. 1 (emphasis added). "Under the strict confines of the common-interest doctrine, the lack of representation for the remaining parties vitiates any claim to privilege." *Cavallaro v. United States*, 153 F. Supp. 2d 52, 61 (D. Mass. 2001). Because the Noteholders were unrepresented, the common interest rule does not apply. *Id.*

Moreover, where applicable, the common interest doctrine protects only communications "with the *attorney* of the member of the community of interest." *Teleglobe*, 493 F.3d at 364 (emphasis in original). Accordingly, communications to or from either U.S. Bank or the Noteholders (rather than between their respective attorneys) would not have been covered, even if U.S. Bank had been represented.

##### C. The "Joint Defense" Privilege Is Inapposite Because No Privilege Ever Attached to Communications By or To the Noteholders.

As noted above, "the joint defense privilege is merely an extension of the attorney-client privilege"; thus it "confers no independent privileged status." *Metro*, 142 F.R.D. at 478. The common interest doctrine is simply an exception to the rule that "[d]isclosing a communication to a third party . . . waives the privilege." *Teleglobe*, 493 F.3d at 361. "Thus, to be eligible for protection under the joint defense privilege, it must be established that the materials fall within the ambit of . . . the attorney-client privilege," to begin with. *Metro*, 142 F.R.D. at 478; *see also Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 152 F.R.D. 132, 140 (N.D. Ill. 1993) ("If no

1 privilege shields a document from discovery, then the common interest doctrine is of no use to a  
2 party.”).

3 Accordingly, even if the common interest doctrine had been applicable, here, it would at  
4 most have protected communications otherwise falling within the ambit of the privilege—i.e.,  
5 those from U.S. Bank to its counsel—that were disclosed to or shared with the Noteholders’  
6 attorneys. *See United States v. BDO Seidman, LLP*, 492 F.3d 806, 815 (7th Cir. 2007)  
7 (“Although occasionally termed a privilege itself, the common interest doctrine is really an  
8 exception to the rule that no privilege attaches to communications between a client and an  
9 attorney in the presence of a third person.”); *Martin*, 278 F.3d at 999-1000 (only communications  
10 “by the client” are privileged). Communications from the Noteholders to either U.S. Bank or its  
11 counsel could not have been protected by the common interest doctrine, nor could  
12 communications from U.S. Bank to the Noteholders, because they do not “fall within the ambit of  
13 . . . the attorney-client privilege,” in the first place.

14 **D. Communications with the Noteholders Are Not Privileged because U.S. Bank**  
15 **Had No Agreement with the Noteholders to Keep them Confidential.**

16 “Even in the context of joint defense agreements, in order for privilege to attach to a  
17 communication, the party asserting the privilege bears the burden of demonstrating that ‘the  
18 communication was given in confidence and that the client *reasonably understood it to be so*  
19 *given.*’” *United States v. LeCroy*, 348 F. Supp. 2d 375, 381-381 (E.D. Pa. 2004) (citation  
20 omitted). Far from meeting this burden, U.S. Bank’s deponent, Ms. Jacobs, testified that U.S.  
21 Bank has not entered into any written or oral joint defense agreement with any of the  
22 Noteholders, and indeed has not even discussed with any of the Noteholders the concept of a joint  
23 defense agreement. (Sears Decl., Ex. “B,” 123:11-19, 139:22-24.) When Finisar asked whether  
24 U.S. Bank had informed any of the Noteholders that it regarded communications between them as  
25 privileged, or whether any of the Noteholders had requested that U.S. Bank afford those  
26 communications such treatment, the deponent was instructed not to answer. (*Id.* at 195:13-21;  
27 197:2-12.)  
28

1 The evidence U.S. Bank has permitted to come forward belies any claim that it reasonably  
 2 understood its communications with the Noteholders were given in confidence, and U.S. Bank  
 3 has improperly frustrated Finisar's ability to gather additional evidence. Accordingly, even if the  
 4 other conditions for invoking the common interest doctrine had been met, still that doctrine could  
 5 not justify U.S. Bank's failures of production.

6 **E. U.S. Bank's Authority Is Inapposite.**

7 Although U.S. Bank, as the proponent of privilege, bore the burden of "establish[ing] all  
 8 the elements," *Martin*, 278 F.3d at 999-1000, it cited no authority to support its claim that  
 9 communications to and from unrepresented third parties were privileged until after Finisar  
 10 presented it with the contrary authorities cited above. Even then, it offered no authority other  
 11 than an inapposite and unsound state court disposition, *U.S. Bank National Association v. U.S.*  
 12 *Timberlands Klamath Falls, L.L.C.*, 2005 WL 2037353 (Del. Ch. Aug. 16, 2005).

13 According to *U.S. Timberlands*, "otherwise privileged communications between the  
 14 Trustee, its counsel, and the Noteholders" fall within the scope of the common interest doctrine.  
 15 *U.S. Timberlands*, 2005 WL 2037353, at \*2. That holding is inapposite, on its face, because the  
 16 communications U.S. Bank seeks to protect in *this* Action are not "otherwise privileged." *See*  
 17 *ante*, p. 6, § IV.C.

18 Moreover, in *U.S. Timberlands*, "the noteholders were required to agree that they would  
 19 maintain the confidentiality of those communications, and were required to state that they did not  
 20 have any connections to the defendants." *U.S. Timberlands*, 2005 WL 2037353, at \*1. Here, by  
 21 contrast, U.S. Bank's designee has testified (so far as she was permitted) that no such conditions  
 22 were imposed. *See ante*, p. 7, § IV.D.

23 In any event, the state court deciding *U.S. Timberlands* based its ruling on Delaware Rule  
 24 of Evidence 502(b), which has no federal counterpart; and because the Court bases its exercise of  
 25 subject matter jurisdiction over *this* Action on a finding that a federal question is presented,  
 26 federal rather than state law governs U.S. Bank's invocation of privilege. *See* Fed. R. Evid. 501.  
 27 Further, *U.S. Timberlands* misconstrued its own rule. By its express terms, that rule expressly  
 28 limits the common interest doctrine to communications "by [the client] or his representative or his

1 lawyer . . . to a lawyer . . . representing another in a matter of common interest.” *U.S.*  
 2 *Timberlands*, 2005 WL 2037353, at \*1 n. 7 (emphasis added). On its face, the rule does not reach  
 3 communications made by or to the (unrepresented) Noteholders, as observed by *Teleglobe*, 493  
 4 F.3d at 364 (citing Del. R. Evid. 502(b) in support of the proposition that “to be eligible for  
 5 continued protection, the communication must be shared with the *attorney* of the member of the  
 6 community of interest. Sharing the communication directly with a member of the community  
 7 may destroy the privilege.”).

8 U.S. Bank has not discharged (and cannot discharge) its burden to establish that privilege  
 9 applies.

## 10 V. CONCLUSION

11 For all of the foregoing reasons, Finisar’s Motion to Compel should be granted, U.S. Bank  
 12 should be compelled to produce additional documents and deposition testimony, and Finisar  
 13 should be given an additional seven hours to conclude the deposition of Ms. Jacobs.

14 DATED: May 13, 2008

Respectfully submitted,

15 Sterling A. Brennan  
 16 L. Rex Sears  
 WORKMAN NYDEGGER A PROFESSIONAL CORPORATION

17 Caroline McIntyre  
 18 BERGESON, LLP

19 By /s/ L. Rex Sears  
 20 L. REX SEARS  
 Attorneys for Plaintiff FINISAR CORPORATION

**SCHEDULE "A":  
TABLE OF QUESTIONS NOT ANSWERED BY DIANA JACOBS**

<b>Ref. No.</b>	<b>Setup</b>	<b>Question</b>	<b>Objection</b>	<b>Response</b>
1	Q: Were you involved in any form of communication to the holders regarding the outcome of that [ENE]?	Q: And what was discussed during that call? (122:17.)	[U.S. Bank:] I'm going to instruct the witness not to disclose privileged information. We would assert that the communication s are protected by the attorney/client privilege. She can describe them in a level of generality that allows you to know broadly what was discussed. (122:18-23.)	Q: And are you going to follow Counsel's instruction and not provide the full information that I've sought?
	A: There was a call with holders subsequent to discuss what happened. (116:4-7.)		[U.S. Bank:] There is a joint defense privilege that would include the three holders and U.S. Bank Trust. They have an identity of interests because the bank only functions according to the directions of the holders. (123:4-8.)	A: Yes. (124:18-21.)

Ref. No.	Setup	Question	Objection	Response
2	Q: U.S. Bank participated in seven conference calls with various holders, right? A: Yes. (125:24-126:1.)	Q: And what was discussed during that call. (129:20.)	[U.S. Bank]: Again let me caution the witness to describe the call in generalities without compromising the attorney/client privilege. (129:21-23.)	A: Generally, we discussed the status of the litigation and strategy. Q: Is that all you're going to disclose to me regarding what was discussed during that call? A: Yes. <sup>1</sup> (129:24-130:3.)
3	Q: Let's turn next to the November 13, 2007, call. (130:4.)	Q: And what was discussed during that call? (130:11.)	[U.S. Bank]: Again I'll caution the witness not to disclose the attorney/client privilege or disclose information that would violate the privilege, but to describe the topic in general terms. (130:12-15.)	A: The topic in general terms was the status of the litigation and strategy. (130:16-17.) Q: Will you tell me any more about the status -- or excuse me -- what was discussed during those calls? A: No. (130:22-24.)
4	Q: Let's go to the December 11, 2007 call. (130:25.)	Q: And what was discussed during that call? (131:5.)	[U.S. Bank]: My instruction remains the same. (131:6-7.)	A: Litigation update and strategy. Q: Will you tell me any more about that call? A: No. (131:8-11.)

<sup>1</sup> Prior to this exchange, counsel for Finisar had requested and received "agreement of counsel that as we move forward, if you make other instructions in the future, that I need not ask" whether the witness would "follow Counsel's instruction and not provide the full information that I've sought" "each time, but instead the witness will be deemed to be following your instructions." (124:18-125:2.)

Ref. No.	Setup	Question	Objection	Response
5	Q: Let's turn to the January 14th, 2008, call. (131:12.)	Q: What was discussed during that call? (131:12.)	[U.S. Bank]: I reiterate my objection and instruction. (131:16-17.)	A: Strategy and the lit -- update on the litigation. Q: Can you tell me any more about that call? A: No. (131:18-21.)
6	Q: Let's go to January 30, 2008. Who are the parties to that call? (131:22-23.)	Q: What was discussed? (131:25.)	[U.S. Bank]: My objection and reiteration -- and instruction are reiterated, rather. (132:1-2.)	A: Aside from the [ENE] that we discussed, it was strategy and status of the litigation. Q: Will you tell me any more about what was discussed during that call? A: No. (132:3-7.)
7	Q: Let's go to February 19th, 2008. Who are the parties to that call? (132:8-9.)	Q: What was discussed? (132:11.)	[U.S. Bank]: I reiterate my objection and instruction. (132:12-13.)	A: Update on the status of the litigation and strategy. Q: Will you tell me any more about what was discussed? A: No. (132:14-18.)
8	Q: That brings us to the March 11, 2008, call. (132:19.)	Q: What was discussed? (132:22.)	[U.S. Bank]: I reiterate my objection and instruction. (132:23-24.)	A: Strategy and update on the status of the litigation. Q: Will you tell me any more about what was discussed? A: No. (132:25-133:4.)

Ref. No.	Setup	Question	Objection	Response
9		Q: If any of the holders have requested U.S. Bank to accelerate, why did U.S. Bank not accelerate in response to a request by any holders? (138:1-3.)	[U.S. Bank]: I object to the extent the question calls for attorney/client privileged information, and instruct the witness not to answer in a way that would compromise the attorney/client privilege. [¶] Can you answer? (138:4-8.)	A: No. (138:9.)
10		Q: Has U.S. Bank informed the holders that U.S. Bank believes that the notes could be accelerated? (138:16-17.)	[U.S. Bank]: I object to the extent that the question calls for attorney/client privileged information. [¶] I instruct you not to answer to the extent that it would compromise the privilege. Answer if you can do -- answer if you may without doing so. (138:18-22.)	A: I think I can't answer. (139:8-9).  Q: And is that because of privilege? A: Yes. (139:14-15.)



Ref. No.	Setup	Question	Objection	Response
11	<p>Q: Have you told me everything about the calls with the holders or purported holders that you're willing to disclose to me today?</p> <p>A: Yes</p> <p>Q: And you have more information, but you're not disclosing it because of the claimed privilege; is that right?</p> <p>A: That's right. (141:11-17.)</p>			
12	<p>Q: Also, just making sure that we're clear on the subject, when I asked you earlier whether any of these holders you had identified had ever requested acceleration, did they in fact make a demand -- any of them make a demand upon U.S. Bank to accelerate under the notes? (149:6-10.)</p> <p>A: No. (149:20.)</p>	<p>Q: Did any of them explain why they were not demanding that U.S. Bank accelerate? (149:21-22.)</p>	<p>[U.S. Bank]: I'm going to instruct you not to answer to the extent that the answer would require you to divulge attorney/client privileged information. Answer if you can without doing so. (149:23-150:1.)</p>	<p>A: I'm trying to go through all the details of the conversation. I think I can't answer. (150:2-3.)</p>

Ref. No.	Setup	Question	Objection	Response
13		Q: Have any of the holders indicated to U.S. Bank that they've been harmed? (180:7-8.)	[U.S. Bank]: Object to the extent it calls for the conclusion of attorney/client information. [¶] Answer if you're able without compromising the privilege. (180:9-12.)	A: Yeah, I guess it's -- I'll have to say I can't answer that. (180:13-14.)
14	Q: So you're not able to provide me any information in terms of how the holders may have been harmed as a result of Finisar's not making certain SEC filings until December 4, 2007?	Q: What have they said? (180:23.)	[U.S. Bank]: Let me make the same objection. Past answering that on a "yes" or "no," if you can answer without disclosing privileged information, do so. (180:24-181:1.)	A: I don't think I can say more than that. (181:2-3.)
15	A: Yeah. I can just say they have not been happy that they have been without financial information. Q: Have any of them told you that? A: They have expressed that, yeah. (180:15-22.)	Q: And tell me as precise as you can what each [noteholder said in] that regard. (181:15-17.)	[U.S. Bank]: Let me instruct you not to answer if it would disclose privileged information. (181:18-19.)	A: Yeah, I can't answer any further than what I've just said. (181:20-21.)

Ref. No.	Setup	Question	Objection	Response
16		Q: In any communication s with the holders, have they ever raised the subject with U.S. Bank of wanting Finisar to make some financial payment to them or other financial compensation as a result of any delay of making SEC filings? (182:14-17.)	[U.S. Bank]: I'll object on the basis of the attorney/client privilege. [¶] You may answer if you can do so that without compromising the privilege. (182:18-21.)	A: I can't answer that. Q: At all? A: At all. (182:22-24.)
17		Q: When there's three Federal District Court decisions that have been issued thus far, indicating that the position that U.S. Bank has been advocating is erroneous, is there something that U.S. Bank feels that it needs to meet its fiduciary duties to its holders relative to Finisar to discontinue the litigation? (193:6-12.)	[U.S. Bank]: I also object to the extent it calls for attorney/client privileged communication . [¶] If you can answer without compromising the privilege, you can do so. (193:13-17.)	A: I don't think I can answer without compromising the privilege. (193:18-19.)

Ref. No.	Setup	Question	Objection	Response
18		Q: Have any of the holders asked U.S. Bank to continue with the litigation? (193:20-21.)	[U.S. Bank]: Let me -- let me object on the privilege ground. [¶] And instruct you not to answer in such a way as would compromise the privilege. You may answer if you can do so without compromising. (193:22-194:1.)	A: I guess I can't answer that. Q: At all? A: I think -- without violating the privilege, I think I can't answer that. (194:2-6.)
19		Q: In any of the discussions with any of the holders -- reported holders, were the holders told that the discussions were going to be treated as attorney/client privileged? (195:13-15.)	[U.S. Bank]: I think that violated the attorney/client privilege to be talking about the attorney/client privilege, what the implications are. I'll object as privilege grounds and instruct her not to answer. (195:18-21.)	(None.)
20		Q: Have any of the holders told you or any other representative of U.S. Bank that they wished to have the communications treated as privileged? (197:2-4.)	[U.S. Bank]: Same objection. (197:12.)	(None.)

Ref. No.	Setup	Question	Objection	Response
21	Q: Have any of the holders -- purported holders ever expressed any concern about the financial condition of Finisar? (199:9-10.)	Q: [What has a noteholder expressed] with that regard? (199:22-23.)	[U.S. Bank]: I would instruct you not to answer unless you can answer without compromising the attorney/client privilege. (199:24-200:1.)	A: Yeah, I can't -- I mean, I can just answer that there's general concern about Finisar's financial health. (200:2-4.)
22	A: Yes. (199:17.)	Q: What about [Finisar's] financial health is the concern? (200:5-6.)	[U.S. Bank]: Same objection. (200:8.)	A: -- that's all I can say. (200:9.)
23		Q: Do you know what the basis is for the concern? (200:10-11.)	[U.S. Bank]: Same objection. (200:12.)	A: I can't answer. (200:13.)  Q: Because of client privilege? A: Yes. (200:16-17.)
24		Q: And was U.S. Bank taking the position that it need not return the collateral because Finisar was in a continuing state of default? (201:4-6.)	[U.S. Bank]: Let me instruct you not to answer if it compromises privilege. Answer if you can without doing so. (201:7-9.)	A: Yeah, I can't without compromising privilege. (201:10-11.)
25	Q: But U.S. Bank did return the collateral, right? A: Yes, we did. (202:11-12.)	Q: Is that because U.S. Bank concluded that Finisar was not in a state of continuing default? (202:13.)	[U.S. Bank]: Object on the privilege. Answer if you can. (202:15-16.)	A: I can't answer that. (202:17.)

**SCHEDULE "B":**  
**TABLE OF PRIVILEGE LOG ENTRIES IDENTIFYING SUBJECT DOCUMENTS**

NO.	DATE	AUTHOR	RECIPIENT	CC	DESCRIPTION	REASON WITHHELD	REDACTED BATE RANGE
60 <sup>1</sup>	07/20/07	Fisco	Noteholder	Wilkinson, Jacobs	Email re acceleration	AC, WP	
64	08/02/07	Beneficial Holder			Draft letter re 5¼% Notes	AC, WP	
65	08/02/07	Beneficial Holder			Draft letter re 5¼% Notes	AC, WP	
76	08/14/07	Financial Advisor	Jacobs		Fax Cover Page – Redact Sender Info – USB FIN 444	WP	USB FIN 000444
123	12/10/07	Waltz	Noteholders	Fisco, Jacobs, Wilkinson	Email re scheduling conference call	AC, WP	
148	01/24/08	Noteholder	Jacobs		Noteholder Verification Form – Redact Noteholder Identity – USB FIN 998-1000	AC, WP	USB FIN 000998 - 1000
149	01/24/08	Noteholder	Jacobs		Noteholder Verification Form – Redact Noteholder Identity – USB FIN 1032	AC, WP	USB FIN 001032
150	01/24/08	Noteholder	Jacobs		Noteholder Verification Form – Redact Noteholder Identity - USB FIN 1071	AC, WP	USB FIN 001071
151	01/24/08	Noteholder	Jacobs		Noteholder Verification Form – Redact Noteholder Identity – USB FIN 2628	AC, WP	USB FIN 002628
157	01/24/08	Jacobs	Noteholders		Email re Noteholder Verification Forms	AC, WP	
173	03/10/08	Grinde	Noteholders	Jacobs, Fisco, Wilkinson	Email re scheduling of conference call	AC, WP	

<sup>1</sup> The reference numbers given are those used in U.S. Bank's privilege log, as are the column headings and the information set forth therein.

NO.	DATE	AUTHOR	RECIPIENT	CC	DESCRIPTION	REASON WITHHELD	REDACTED BATE RANGE
187		Noteholder	Jacobs		Noteholder Verification Form – Redact CUSIP No. – USB FIN 1045		
188		Noteholder	Jacobs		Noteholder Verification Form – Redact CUSIP No. – USB FIN 1046		
189		Noteholder	Jacobs		Noteholder Verification Form – Redact CUSIP No. – USB FIN 1047		
190		Noteholder	Jacobs		Noteholder Verification Form – Redact CUSIP No. – USB FIN 1060		
191		Noteholder	Jacobs		Noteholder Verification Form – Redact CUSIP No. – USB FIN 1061		
192		Noteholder	Jacobs		Noteholder Verification Form – Redact CUSIP No. – USB FIN 1062		
193		Noteholder	Jacobs		Noteholder Verification Form – Redact CUSIP No. – USB FIN 1072		
194		Noteholder	Jacobs		Noteholder Verification Form – Redact CUSIP No. – USB FIN 1073		
195		Noteholder	Jacobs		Noteholder Verification Form – Redact CUSIP No. – USB FIN 1074		
196		Noteholder	Jacobs		Noteholder Verification Form – Redact CUSIP No. – USB FIN 1152		
197		Noteholder	Jacobs		Noteholder Verification Form – Redact CUSIP No. – USB FIN 2625		

NO.	DATE	AUTHOR	RECIPIENT	CC	DESCRIPTION	REASON WITHHELD	REDACTED BATE RANGE
198		Noteholder	Jacobs		Noteholder Verification Form – Redact CUSIP No. – USB FIN 2626		
199		Noteholder	Jacobs		Noteholder Verification Form – Redact CUSIP No. – USB FIN 2627		
200		Noteholder	Jacobs		Noteholder Verification Form – Redact CUSIP No. – USB FIN 1153		
201		Noteholder	Jacobs		Noteholder Verification Form – Redact CUSIP No. – USB FIN 1214		
202		Noteholder	Jacobs		Noteholder Verification Form – Redact CUSIP No. – USB FIN 1215		
203		Noteholder	Jacobs		Noteholder Verification Form – Redact CUSIP No. – USB FIN 1216		
204		Noteholder	Jacobs		Noteholder Verification Form – Redact CUSIP No. – USB FIN 1154		
207		Noteholder	Jacobs		Noteholder Verification Form – Redact Noteholder Identity – USB FIN 445	AC, WP	USB FIN 000445 - 445
208		Noteholder	Jacobs		Noteholder Verification Form – Redact Owner Identity – USB FIN 446	AC, WP	USB FIN 000446 - 446



**CERTIFICATE OF SERVICE**

I hereby certify that on May 13, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:  
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